Neoh Khoon Lye v Trans-Intan Sdn Bhd

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–132 OF 2001
TEE AH SING J
12 APRIL 2002

Land Law *— Housing developers — Delay in completion — Set off — Claim for progressive payments to be set off against liquidated damages due to delay — Whether agreement allowed right of set off or excluded such right — Common facilities not completed, whether claim for set off premature*

The defendants was a housing developer and the plaintiff was the purchaser under the sale and purchase agreement ('the agreement'). The defendant notified the plaintiff on 23 February 2001 of the delivery of vacant possession of the property after a delay of 431 days from the prescribed date of delivery as provided in the agreement. The plaintiff was to forward the sums of RM51,729.57 and RM2,300 to the defendants being the final progressive payments under the agreement. As at the time of the defendants' notice of 23 February 2001, the defendants have yet to issue a certificate of completion of the common facilities, contrary to cl 24(1) of the agreement. The plaintiff calculated the liquidated damages due for 431 days as amounting to RM26,673.35 and made payments after setting off the liquidated damages against the progressive payments. The defendants refused the set off and returned the plaintiff's cheques. The defendants demanded the plaintiff to make full payment. The issue was whether from the wording of the agreement, there was express provision to exclude the right of set off or it could be implied that the parties had intended to exclude the right of set off.

Held:

(1) The agreement did not provide that payment of liquidated damages by the defendants was conditional upon full payment of the purchase price nor did it by necessary implication prohibit a set off of liquidated damages against the balance of the purchase price (see pp 15I–16A).

(2) Although the common facilities were still not completed to date, the plaintiff's right of action for damages for breach of contract — following the general rule — accrued on the date of the breach which, in this case, was the day after the time limited under cl 24(1) for the completion of the common facilities, ie on 22 December 1999. Thus, the claim of the plaintiff for set off was proper and not premature (see p 17C–D); *Loh Wai Lian v SEA Housing Corporation Sdn Bhd* [1987] 2 MLJ 1 not followed.

(3) The plaintiff's cross claim and the defendant's claim arose out of the same transaction and were closely connected with each other. The plaintiff's cross claim was so closely connected with the defendant's demand that it would be manifestly unjust to allow

A the defendant to enforce payment without taking into account the plaintiff's cross claim. The plaintiff had an equitable right of set off against the final claim of the defendant. The plaintiff did not breach the agreement when the plaintiff paid the difference of the defendants' claim less the set off (see pp 17G, 18B, E).

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[Bahasa Malaysia summary

Defendan-defendan adalah pemaju perumahan dan plaintif adalah pembeli di bawah perjanjian jualbeli ('perjanjian jualbeli'). Defendan telah memaklumkan kepada plaintif pada 23 Februari 2001 tentang C penyerahan milikan kosong ke atas hartanah tersebut selepas kelewatan 431 hari daripada tarikh penyerahan yang ditetapkan sebagai mana yang diperuntukkan dalam perjanjian tersebut. Plaintif sepatutnya mengemukakan sejumlah RM51,729.57 dan RM2,300 kepada defendan-defendan sebagai bayaran secara berperingkat-peringkat yang terakhir di bawah perjanjian. Semasa notis defendan D bertarikh 23 Februari 2001 diberikan, defendan-defendan masih belum mengeluarkan satu sijil penyiapan kemudahan umum tersebut, yang bertentangan dengan kl 24(1) perjanjian tersebut. Plaintif telah membuat pengiraan terhadap ganti rugi jumlah tertentu yang perlu dibayar untuk 431 hari yang berjumlah RM26,673.35 dan membuat E bayaran setelah menolak ganti rugi jumlah tertentu dengan bayaran secara berperingkat tersebut. Defendan-defendan enggan menerima tolakan tersebut dan memulangkan cek-cek plaintif. Defendan-defendan menuntut agar plaintif membuat bayaran penuh. Persoalannya adalah sama ada daripada perkataan perjanjian tersebut, terdapat peruntukan yang nyata untuk mengecualikan hak tolakan F atau ia boleh dibaca secara tersirat bahawa pihak-pihak tersebut berniat untuk mengecualikan hak tolakan tersebut.

Diputuskan:

(1) Perjanjian tersebut tidak memperuntukkan bahawa bayaran ganti G rugi jumlah tertentu oleh defendan-defendan adalah dengan syarat bayaran penuh dibuat terhadap harga jualan, juga perjanjian tersebut tidak secara implikasi menghalang satu tolakan ganti rugi jumlah tertentu terhadap baki harga jualan (lihat ms 15I–16A).

H (2) Walaupun kemudahan umum tersebut masih tidak siap sehingga kini, hak tindakan plaintif untuk mendapat ganti rugi kerana pelanggaran kontrak — mengikut peraturan am — telah terakru pada tarikh pelanggaran di mana, di dalam kes ini, adalah pada hari selepas masa yang dihadkan di bawah kl 24(1) untuk penyiapan kemudahan umum tersebut; iaitu, 22 Disember 1999. I Oleh itu, tuntutan plaintif untuk tolakan adalah betul dan tidak pra masa (lihat ms 17C–D); *Loh Wai Lian v SEA Housing Corp Sdn Bhd* [1987] 2 MLJ 1 tidak diikut.

(3) Tuntutan balas plaintif dan tuntutan defendan timbul daripada transaksi yang sama dan amat berkait rapat dengan satu sama lain. Tuntutan balas plaintif amat berkait rapat dengan tuntutan defendan di mana ia adalah amat tidak adil untuk membenarkan defendan menguatkuasakan bayaran tanpa mengambilkira tuntutan balas plaintif. Plaintif mempunyai satu hak equiti berhubung tolakan terhadap tuntutan akhir defendan. Plaintif tidak melanggar perjanjian tersebut apabila plaintif membayar perbezaan tuntutan defendan kurang tolakan tersebut (lihat ms 17G, 18B, E).]

[*Editorial Note:* The defendants have appealed to the Court of Appeal vide Civil Appeal No P02–176 of 2002.]

Notes

For a case on delay in completion, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) para 2450.

Cases referred to

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1988] 3 MLJ 90 (refd)

Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd [1996] 3 MLJ 675 (refd)

Gibb & Co v Malaysia Building Society Bhd [1982] 1 MLJ 271 (refd)

Insun Development Sdn Bhd v Azali bin Bakar [1996] 2 MLJ 18 (refd)

Loh Wai Lian v SEA Housing Corporation Sdn Bhd [1987] 2 MLJ 1 (not folld)

Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd [1995] 2 MLJ 5 (refd)

SEA Housing Corporation Sdn Bhd v Lee Poh Choo [1982] 2 MLJ 31 (refd)

Legislation referred to

Housing Developers (Control and Licensing) Act 1966.

Daphne Choy (*Choy & Associates*) for the plaintiff.
Ong Wee En (*Shahrizat & Tan*) for the defendants.

Tee Ah Sing J: This is an application by summons in chambers by the plaintiff for the following orders:

(i) that the defendants whether by themselves, directors, servants, agents or nominees or howsoever, do forthwith deliver to the plaintiff vacant possession of the property known as parcel No 3, 19th Floor, Block D, Miami Green, Penang ('the property');

(ii) that in the event the defendants fail to deliver vacant possession of the property within 14 days from the date of the order herein, the plaintiff

A and/or his servants, agents or nominees shall be entitled to apply reasonable force to enter the said property and the defendants shall be liable for all costs arising therefrom;

(iii) that the defendants do pay the costs of this application to the plaintiff; and

B (iv) that there be such further reliefs and/or orders as may be deemed just and necessary.

By a sale and purchase agreement dated 21 December 1996 entered into between the plaintiff as the purchaser and the defendants as the vendor ('the agreement'), the defendants agreed to sell the property to the plaintiff for C the total purchase price of RM225,888.

The defendants are a housing developer licensed under the Housing Developers (Control and Licensing) Act 1966.

Subsequent to the execution of the agreement, the plaintiff settled each and every demand for progressive payment made by the defendants.

D The defendants had, via their letter of 23 February 2001 to the plaintiff, given notice that the final stage of the construction works on the property had been completed and demanded the sums of RM33,883.20 and RM11,294.40 being the final progressive payment due to the defendants and the stakeholders sum due to Anoop & See respectively under the schedule of payment in respect of the agreement.

E The defendants had, via another letter of 23 February 2001 to the plaintiff, given notice that the defendants were ready to deliver vacant possession of the said property and that the plaintiff was to forward the sums of RM51,729.57 and RM2,300 to the defendants and to Belleview Bina Sdn Bhd respectively.

F Under cl 22(1) of the agreement, the prescribed date of delivery of vacant possession of the said property is within 36 calendar months of the date of signing of the agreement (21 December 1996) that is on 21 December 1999.

So the defendants were ready to hand over vacant possession on G 23 February 2001. Thus, there was a delay of 431 days from 21 December 1996 to 23 February 2001. The plaintiff calculated the liquidated damages due for 431 days as amounting to RM26,673.35. So the plaintiff instructed his solicitors, Choy & Assoc, to give notice via their letter of 12 March 2001 to the defendants that as at 23 February 2001, a sum of RM26,673.35 was due to the plaintiff as liquidated damages pursuant to cl 22(2) of the H agreement.

Clause 24(1) of the agreement stipulates that the common facilities serving the housing development wherein the said property is located, are to be completed by the defendants by 21 December 1999. As at the time of the defendants' notice of 23 February 2001, the defendants have yet to issue I a certificate of completion of the common facilities.

So there was a delay of 431 days from 21 December 1999 to 23 February 2001.

Although the delay of completion of the common facilities is still continuing, for purposes of settlement of the final progressive payment the plaintiffs had instructed his solicitors, Choy & Associates, to give notice via their letter of 12 March 2001 that as at 23 February 2001, a sum of RM5,334.67 was due to the plaintiff as liquidated damages for delay pursuant to cl 24(2) of the agreement. A

The plaintiff after setting off the said sums of RM26,673.35 and RM5,334.67 forwarded vide letter dated 12 March 2001 from Choy & Associates, three cheques for the following sums due: B

(a) OUB cheque 018253 for a sum of RM11,294 made out to Anoop & See being the stakeholder's sum;

(b) OUB cheque 018252 for a sum of RM2,300 made out to Belleview Bina Sdn Bhd being the balance outstanding for an additional package; and C

(c) OUB cheque 018251 for a sum of RM8,427.15 made out to Trans-Intan Sdn Bhd, the defendants, being the final progressive payment less the liquidated damage due to the plaintiff (RM33,883.20 – [RM26,673.35 + RM5,334.67]). D

The plaintiff instructed his solicitors to enquire via their letter of 14 March 2001 when the keys to the said property could be collected.

The defendants had replied via their letter dated 15 March 2001 to Choy & Assoc that they were not agreeable to the set off of the liquidated damage due to the plaintiff against the final progressive payment, and returned the plaintiff's OUB cheque 018251 for a sum of RM8,427.15. The defendants demanded the plaintiff to make full payment. E

The plaintiff had on 15 March 2001 instructed his solicitors, Choy & Assoc, to write to the defendants to enquire what provisions allowed the defendants to refuse the set off considering that the liquidated damages were due to him under the agreement. The plaintiff has to date not received a reply to his solicitor's said letter of 15 March 2001. Instead, the defendants has via their letter dated 19 March 2001, projected the subject of liquidated damages as one which requires 'a total solution' involving the developer, contractors, architect and purchasers. F G

The defendants through their letter dated 23 March 2001, demanded payment from the plaintiff pursuant to cl 4 and item 3 and 4 in the Third Sch under the agreement.

The plaintiff through his solicitor's letter dated 27 March 2001, once again sent the said cheque to the defendants. And the defendants vide letters dated 27 April 2001 and 2 May 2001, returned the said cheque to the plaintiff. Vide the said letter dated 27 April 2001, the defendants gave notice to the plaintiff under cl 9(2) of the agreement that in the event that the plaintiff did not make full payment within 14 days from the date of the said letter, the agreement is deemed to have been terminated. H I

As the defendants refused to accept the plaintiff's said OUB cheque 018251 for the sum of RM8,427.15, the plaintiff paid to the defendant via

telegraphic transfer the sum of RM8,427.15 on 9 May 2001. However, according to the defendants, the plaintiff had on 9 May 2001 made payment by telegraphic transfer into the account of the defendants without the knowledge and consent of the defendants.

The defendants also averred in their affidavits that they accept the breach of the agreement by the plaintiff and intents to terminate the agreement and refund the sum of RM154,754.92 in respect of all payments made by the plaintiff less a sum of 20% from the purchase price and interest charged for late payment pursuant to cll 8 and 9 of the agreement. The letter of termination and cheque for a sum of RM154,754,92 has been prepared by the defendants and is exhibited as exh 'HICC-8'. And the defendants have intention to send the letter and cheque to the plaintiff. But the defendants are not able to do so because this court had on 17 May 2001 directed that the status quo be maintained until the hearing of encl 3 on 13 June 2001.

Both the learned counsels for the plaintiff and the defendants have respectively put in lengthy written submissions and replies. I have perused all the said submissions. I shall now deal with the application before me.

The relevant parts of the agreement are as follows:

> 4 Schedule of payments
>
> (1) The purchase price shall be paid by the purchaser to the vendor by instalments and at the time and in the manner as prescribed in the Third Sch hereto.
>
> (2) Every notice referred to in the Third Sch requesting for payment shall be supported by a certificate signed by the vendor's architect or engineer in charge of the housing development and every such certificate so signed shall be proof of the fact that the works therein referred to have been completed.
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> ...
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> 7 Time essence of contract
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> Time shall be the essence of the contract in relation to all provisions of this agreement.
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> 8 Interests on late payments
>
> Without prejudice to the vendor's rights under cl 9 hereof, if any of the instalments set out in the Third Sch hereto shall remain unpaid by the purchaser at the expiration of the said period of fourteen (14) days, interest on such unpaid instalments or instalments shall commence immediately thereafter and be payable by the purchaser, such interest to be calculated from day to day at the rate often per centum (10%) per annum.
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> 9 Default by purchaser and determination of agreement
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> (1) If the purchaser:
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> (a) fails to pay any instalments payable under cl 4(1) in accordance with the Third Sch hereto or any part thereof and any interest payable under cl 8; or
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> (b) commits any breach of the terms or conditions contained in this agreement or fails to perform or observe all or any of the purchaser's covenants herein contained; or

(c) before payment in full of the purchase price of the said parcel, commits an act of bankruptcy or enters into any composition or arrangement with his creditors or being a company enters into liquidation whether compulsory or voluntary;

the vendor may subject to sub-cl (2) hereof, annul the sale of the said parcel and forthwith terminate this agreement and in such an event:

(i) the vendor shall be entitled to deal with or otherwise dispose of the said parcel in such manner as the vendor shall see fit as if this agreement had not been entered into;

(ii) the instalments previously paid by the purchaser to the vendor, excluding any interest paid, shall be dealt with and disposed of as follows:

(a) firstly, all interest calculated in accordance with cl 8 hereof owing and unpaid shall be paid to the vendor;

(b) secondly, an amount to be forfeited by the vendor as follows:

(i) where up to fifty per centum (50%) of the purchase price has been paid, an amount equal to ten per centum (10%) of the purchase price:

(ii) where more than fifty per centum (50%) of the purchase price has been paid an amount equal to twenty per centum (20%) of the purchase price:

(c) lastly, the residue thereof shall be refunded to the purchaser;

(iii) neither party hereto shall have any further claim against the other for costs, damages, compensation or otherwise hereunder; and

(iv) each party hereto shall pay its own costs in the matter.

(2) If the purchaser fails to comply with any of the terms of this agreement or if any of such unpaid instalments and interest remain unpaid for any period in excess of twenty-eight (28) days after its due date, the vendor shall give the purchaser or his solicitors not less than fourteen (14) days' notice in writing by AR Registered post to treat this agreement as having been repudiated by the purchaser and unless in the meanwhile such default and/or breach alleged is rectified or such unpaid instalments and interest are paid, this agreement shall, at the expiration of the said notice, be deemed to be annulled.

22 Time for handing over of vacant possession

(1) Vacant possession of the said parcel to which water and electricity supply are ready for connection shall be handed over to the purchaser within thirty-six (36) calendar months from the date of this agreement:

(2) If the vendor fails to hand over vacant possession of the said parcel, to which water and electricity supply are ready for connection to the said parcel, in time, the vendor shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price.

23 Manner of delivery of vacant possession

(1) Upon the issuance of a certificate by the vendor's architect certifying that the construction of the parcel has been duly completed and water and

electricity supply are ready for connection to the parcel and the vendor has applied for the issuance of the Certificate of Fitness for Occupation from the Appropriate Authority and the purchaser having paid all monies payable under cl 4(1) in accordance with the Third Sch and all other monies due under this agreement and the purchaser having performed and observed all the terms and covenants on his part under this agreement the vendor shall let the purchaser into possession of the said parcel PROVIDED THAT such possession shall not give the purchaser the right to occupy and the purchaser shall not occupy the said parcel until such time as the Certificate of Fitness for Occupation for the said Building is issued.

(2) Upon the expiry of fourteen (14) days from the date of a notice from the vendor requesting the purchaser to take possession of the said parcel, whether or not the purchaser has actually entered into possession or occupation of the said parcel, the purchaser shall be deemed to have taken delivery of vacant possession.

24 Completion of common facilities

(1) The common facilities serving the said housing development shall be completed by the vendor within thirty-six (36) calendar months from the date of this agreement.

(2) If the vendor fails to complete the common facilities in time the vendor shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the last twenty per centum (20%) of the purchase price.

I agree with the contention of the plaintiff that the Court of Appeal decision in *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675 is distinguishable from the present case as that case does not deal with the issue of set off.

The main ground of defence propounded by the defendants is that the plaintiff is not entitled to unilaterally set off the liquidated damages due to the plaintiff against the final progressive payment due to the defendants. The defendants' contention is that pursuant to cl 23(1) of the agreement, the plaintiff has to make payment of the full purchase price of the said property before the plaintiff is entitled to vacant possession.

In *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57, the Supreme Court had held that parties to a building contract may by express words or 'by clear implication' provide for the ouster or exclusion of the common law right of set off; in other words, each case would turn upon the particular wording of the contract. And, in that particular case, the Supreme Court did find that the provisions of that governing PAM formulated contract showed an implicit intention of the parties to exclude the right of set off.

Thus, the issue for this court to determine is whether from the wording of the agreement, there is express provision to exclude the right of set off or it can be implied that the parties had intended to exclude the right of set off.

I have perused the whole agreement and in particular cl 23(1) and I am of the view that the agreement does not provide that payment of liquidated damages by the defendants is conditional upon full payment of the purchase

price nor does it by necessary implication prohibit a set off of liquidated damages against the balance of the purchase price. A

In *Insun Development Sdn Bhd v Azali bin Bakar* [1996] 2 MLJ 188, his Lordship Edgar Joseph Jr (delivering the judgment of the Federal Court) at p 192 said:

> ... The essential facts may be shortly stated. The agreement was dated 12 December 1984 and by cl 18 thereof, it was provided as follows: B
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> (1) The said building shall be completed by the vendor and vacant possession delivered to the purchaser within twenty-four (24) calendar months from the date of this agreement.
>
> (2) If the vendor fails to deliver vacant possession of the said building in time the vendor shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchaser price. C
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> ...
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> In giving judgment for the purchaser, the judge relied heavily on the Malaysian Privy Council decision in *Loh Wai Lian v SEA Housing Corp Sdn Bhd* [1987] 2 MLJ 1. It follows that the point of central importance to this appeal is whether the present case is governed by the judgment of the Privy Council in *Loh Wai Lian*, as the judge thought. D

And at p 197 His Lordship said:

> It is obvious from the judgment of the Privy Council in *Loh Wai Lian* that but for the unusual language of cl 17 of the contract of sale, which had provided a formula for the computation of damages payable by the developer to the buyer for delay, by defining not merely the *terminus a quo* (the opening date) required under r 12(r) of the 1970 Rules but also the *terminus ad quem* (the closing date) — not required under r 12(1)(r) — the case would have been differently decided, for their Lordships said this (at p 4): E
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> > 'If the question is asked "in the absence of such an express provision when would the purchaser's right of action for damages for breach of contract accrue?" the answer is plainly the date on which the breach occurred. But parties to a contract are, of course, entitled to regulate or modify their rights in the event of breach in any way that they think fit and the accrual of any cause of action then becomes a matter of the correct construction of what they have provided. This appeal raises no point of principle but simply a question of what is the true construction of the contract in which the parties entered.' F G
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> In our view, for the reasons stated *Loh Wai Lian* is, therefore, readily distinguishable from the present case and accordingly, the judge was, with respect, wrong in holding that it was of decisive importance to the question which arose for decision. H
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> It follows, therefore, that our answer to the crucial question aforesaid is: because the agreement by cl 18(2) had provided for a formula for the calculation of liquidated damages which defined the *terminus a quo* (the opening date) but not the *terminus ad quem* (the closing date), the purchaser's right of action for damages for breach of contract — following the general rule — accrued on the date of the breach which, in this case, was the day after the time limited under cl 18(2) for the delivery of vacant possession, that is to say, I

A on 12 December 1986. Accordingly, the purchaser, having commenced proceedings only on 31 July 1993, was more than seven months out of time. We are thus driven to the inevitable conclusion that the purchaser's claim was statute-barred under the provisions of s 6(1) of the Limitation Act 1953.

The learned counsel for the defendants relies on the case of *Loh Wai Lian* to support the argument that as the common facilities are not completed yet, the plaintiff's claim is premature in that the full sum of liquidated damages due to the plaintiff cannot be ascertained, and hence the cause of action has yet to arise.

It is clear that the Federal Court has in *Insun Development Sdn Bhd* distinguished the decision in *Loh Wai Lian*. I am of the view that the case of *Loh Wai Lian* has no application to the present case before me.

Although the common facilities are still not completed to date, the plaintiff's right of action for damages for breach of contract — following the general rule — accrued on the date of the breach which, in this case, was the day after the time limited under cl 24(1) for the completion of the common facilities; that is to say, on 22 December 1999. So I am of the view that the claim of the plaintiff for set off was proper and not premature.

In *SEA Housing Corp Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31, his Lordship Suffian LP (delivering the judgment of the Federal Court) at p 33 said:

> Three issues arises before us in the appeal:
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> (1) Is cl 32 of the agreement valid?
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> (2) If so, was the learned Judicial Commissioner right in holding that the acute shortage of cement, etc; did not come within cl 32 such that the defendant is not liable for the delay? and
>
> (3) Did the plaintiff in withholding payment of the last instalment due commit breach of the agreement?

And in p 34 His Lordship said:

> As regards the third issue we are of the opinion that the plaintiff did not breach the agreement when she withheld payment of the money demanded by the defendant.
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> ...
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> The plaintiff's cross claim and the defendant's claim arises out of the same transaction and are closely connected with each other. The plaintiff's cross claim is so closely connected with the defendant's demand that it would be manifestly unjust to allow the defendant to enforce payment without taking into account the plaintiff's cross claim.

There has been a delay of 431 days in the delivery of vacant possession of the said property.

The liquidated damages under cl 22(2) of the agreement amounted to RM26,673.35. As at the time of the defendants' notice of 23 February 2001, the defendants have yet to issue a certificate of completion of the common facilities. For the delay of 431 days the liquidated damages under cl 24(2) of the agreement amounted to RM5,334.67.

The plaintiff's right to liquidated damages is a cross claim which arises out of the same transaction as the defendants' right to be paid the balance of the purchase price and is so closely connected with it that it would be manifestly unjust if I were to order that the plaintiff should pay over to the defendants the sums of RM51,729.57 and RM2,300 without taking into account the amount of liquidated damages due to the plaintiff amounting to RM33,883.20.

I am of the view that the plaintiff has an equitable right of set off against the final claim of the defendants.

The plaintiff after setting off the said sums of RM26,673.35 and RM5,334.67 forwarded vide letter dated 12 March 2001 from Choy & Associates, three cheques for the following sums due:

(a) OUB cheque 018253 for a sum of RM11,294 made out to Anoop & See being the stakeholder's sum;

(b) OUB cheque 018252 for a sum of RM2,300 made out to Belleview Bina Sdn Bhd being the balance outstanding for an additional package;

(c) OUB cheque 018251 for a sum of RM8,427.15 made out to Trans-Intan Sdn Bhd, the defendants, being the final progressive payment less the liquidated damages due to the plaintiff (RM33,883.20 – [RM26,673.35 + RM5,334.67]).

By the aforesaid action the plaintiff has fulfil his obligations under the agreement. And I am also of the view that the plaintiff did not breach the agreement when the plaintiff paid the difference of the defendants' claim dated 23 February 2001 less the set off.

The defendants have via their letter of 15 March 2001 and 19 March 2001, evidenced an intention to repudiate the agreement and refused any longer to be bound by it by refusing to accept the payment tendered by the plaintiff on the ground that the plaintiff has no right to set off. I am of the view that it was the defendants who wrongly repudiated the agreement by the aforesaid letters.

The learned counsel for the defendants had submitted that the plaintiff did not aver that he is jobless at present. It was only disclosed subsequently after the defendants raised this issue. The plaintiff has failed to show that he has the means to fulfil his undertaking as to damages. The answer to this can be found in the case of *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90 where his Lordship Edgar Joseph Jr J (as he then was) at p 100 said:

> In any event, the court will not generally deny a plaintiff an interlocutory injunction to which he would otherwise be entitled simply on the ground that his cross-undertaking in damages would be of limited or of no value. So, for example, in *Allen v Jambo Holdings Ltd* [1980] 2 All ER 502 the Court of Appeal held, when granting a Mareva injunction, that a cross undertaking was acceptable from the plaintiffs although he was legally aided. The rationale behind this was that questions of financial ability ought not to affect the position in regard to what is the essential justice of the case.

A The principles of law in respect of an interim mandatory injunction are succinctly set out in the case of *Gibb & Co v Malaysia Building Society Bhd* [1982] 1 MLJ 271.

I agree with the submission of the plaintiff that so long as the strata title to the said property has not been issued, the plaintiff would be unable to deal with or dispose off the said property without the consent or knowledge of the defendants. The plaintiff has paid to the defendants the full purchase price of the said property less the liquidated damages due to him.

The plaintiff would also be put to the expense and inconvenience of paying the full sum of the final progressive payment while the defendants would be allowed to remain indebted to the plaintiff indefinitely in respect of the liquidated damages.

I also agree with the contention of the plaintiff that while the plaintiff has settled all outstanding amounts due to the defendants and he is without dispute the legal and beneficial owner of the said property, the defendants are nevertheless withholding delivery of vacant possession of the said property to coerce the plaintiff to pay out monies without taking the issue of set off of the liquidated damages into consideration.

This application is urgent as the defendants have by their conduct shown their intention to terminate the agreement and refused any longer to be bound by it notwithstanding that the plaintiff has paid to the defendants the full purchase price of the said property less the liquidated damages due to him. I find that the balance of convenience lies in favour of the plaintiff. On the other hand, there will be little, if any, hardship caused to the defendants if the injunction is granted in that the defendants would have to do little more than to hand the keys to the said property over to the plaintiff. Damages is not an adequate remedy in this case.

The issue of whether the plaintiff has a right of set off in respect of the liquidated damages due to the plaintiff is a serious issue to be tried.

I am of the view that the defence of the defendants that the plaintiff has no right to set off will ultimately fail in the trial of this case. The plaintiff's case is 'unusually sharp and clear' which is a fit and proper case to grant the mandatory injunction.

In view of the aforesaid, I granted orders in terms of prayers (i), (ii) and (iii) of the application.

Order accordingly.

Reported by Peter Ling